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Supreme Court Of The United States

OCTOBER TERM, 1954

No. 648

J. L. HOLBROOK, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

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No. .....

J. L. HOLBROOK, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of J. L. Holbrook respectfully shows;

REFERENCE TO OPINIONS

1(a) The opinion of the Court of Appeals for the Fifth Circuit and its judgment sought to be reviewed will be found in the certified Transcript of the Record, simultaneously filed herewith, p. 358. Also 216 F. 2d 238. No opinion was filed by the District Judge.

GROUNDS OF JURISDICTION

1(b) Jurisdiction of this Court is invoked because:

Ground 1

Petitioner contends the Court of Appeals has decided an important question of Federal law, adversely to him, involving proper venue in the trial of the case arising out of a violation of Internal Revenue Code § 145(b), 26 USCA. § 145(b), on a rule which has not been, but should be, settled by this Court.

Ground 2

The Court of Appeals has rendered a decision in conflict with a decision of another Court of Appeals on the same matter.

Ground 3

The Court of Appeals has decided a Federal question in a way in conflict with applicable desisions of this Court.

Ground 4

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such departure by a lower court as to call for an exercise of this Court's power of supervision.

Dates Involved

(i) The date of the judgment sought to be reviewed was October 29, 1954 (Tr., p. 364).

(ii) Petitioner filed in the Court of Appeals his petition for rehearing within twenty-one days, as provided by Rule 29, Circuit Court of Appeals, Fifth Circuit, November 18, 1954(Tr., p. 365). The petition for rehearing was considered and denied February 8, 1955 (Tr., p. 375).

Statute Involved

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question is:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,

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before or after rendition of judgment or decree; . . . ."

1948 Revised Judicial Code § 1254, Volume 1, page A81, 28 USCA. § 1254, page 42.

QUESTIONS PRESENTED FOR REVIEW

1(c) The questions here presented for review arise out of the fact that petitioner was indicted by a grand jury in the District Court of the United States for the Northern District of Georgia, Atlanta Division, charging that he did wilfully and knowingly attempt to defeat and evade income tax due and owing by him to the United States of America for the calendar year 1945 in violation of § 145(b), Internal Revenue Code; 26 USCA. 145(b), and before pleading to the merits petitioner filed his motion to dismiss the indictment on the ground that the Court was without jurisdiction because: (1) The offense. if any, was committed in the District Court of the United States for the Northern District of Georgia, Gainesville Division, (2) that the grand jury returning the indictment was drawn from the Atlanta Division, not from a box containing the names of all grand jurors within said district. In the alternative, his motion was to transfer the case to the Gainesville Division because: (1) The offense. if any, was committed in that Division, (2) That it would be necessary for his defense to procure for his trial more than twelve witnesses, all residing in the Gainesville Division and the expense involved would be great and burdensome for petitioner and place a hardship on the witnesses, (3) That if a trial of the case was not required by law to occur in the Gainesville Division, such would be in keeping with the spirit of Rule 18, Federal Rules of Criminal Procedure, and constitutional provisions relating thereto.

The case was tried before a jury in the Atlanta Division. Petitioner's motion for a judgment of acquittal at the conclusion of the evidence was overruled by the

trial Court. The jury returned a verdict of guilty January 13, 1954 (Tr., p. 341). Petitioner within five days from the time the jury was discharged and on January 15, 1954, filed in writing a renewal of this motion for a judgment of acquittal, and in the alternative a motion for a new trial (Tr., pp. 343 and 344). This was overruled by the trial judge April 15, 1954 (Tr., p. 345). Petitioner filed his notice of appeal April 24, 1954 (Tr., pp. 345 and 346). In his statement of points filed May 18, 1954 (Tr., pp. 346 and 347), he assigned error (1) on the overruling of his motion to dismiss the indictment and in the alternative to transfer the indictment to the Gainesville Division, (2) the trial court erred in refusing to grant petitioner's motion for a judgment of acquittal at the conclusion of the evidence, (3) that the trial judge erred in refusing to grant and in overruling his renewed motion for a judgment of acquittal filed in writing, (4) that the verdict of the jury was without evidence to support it, (5) that the verdict of the jury was not authorized by the evidence, and (6) that the evidence demanded a judgment of acquittal. The case was thereby transferred to the Court of Appeals where proceedings were had as indicated in paragraph 1(b)(i) above.

APPLICABLE CONSTUTIONAL PROVISION

1(d) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment VI, Constution of the United States, U S C A. Constitution, Amend. 1
To 13, page 327.

FACTS MATERIAL TO QUESTIONS PRESENTED

Venue

1(e) Petitioner resided and conducted his business in Forsyth County, Georgia (Tr., p. 141). He employed Perry S. Oliver, a tax attorney, at Gainesville, Hall County, Georgia, to make the tax return involved in the indictment, including tax return of Stripland & Holbrook, a partnership composed of H. A. Stripland and J. A. Holbrook, pertinent to the issue involved and in evidence, and on January 10, 1946, the tax attorney mailed the returns in question to petitioner at Cumming, Forsyth County, Georgia (Tr., pp. 35, 36 and 37). The returns were signed at Cumming before a Notary and deposited in the mails there (see returns in question). Both Forsyth and Hall Counties, Cumming and Gainesville are in the Gainesville division of the District Court of the United States for the Northern District of Georgia (28 USCA. § 90, p. 339). Thus the issue of venue arises.

Facts Pertinent To Sufficiency of Evidence To Support Verdict

Petitioner was raised on a farm and married the only daughter of H. A. Stripland, the man who was in partnership with him under Stripland and Holbrook, January 3, 1923. He was then farming and continued to farm for a few years. He went in partnership with his father-in-law, Mr. Stripland, in running a country store around 1925, and they continued to run the little store there up until around 1942. In addition to his farming and working in the store, he drove a school bus (Tr., p. 254). He attended school a few months in the winter and summer, completing the sixth grade but never completed the seventh (Tr. 257).

The Government relied in the main on the evidence of (1) Perry S. Oliver, the tax attorney employed by peti-

tioner, (2) J. A. Oxford and E. F. Trotter, Government accountants, for establishing facts necessary to a conviction. Oliver never saw any of the records kept by Stripland and Holbrook or by J. L. Holbrook (Tr., p. 24). It was undisputed that they were engaged mainly in the sale of feed for growing broilers and baby chicks, that they had no other business of any consequence — the only business they carried on in 1945 was the poultry and feed business (evidence of Trotter, Tr., p. 226). Oliver was recommended to Holbrook as a good tax man and was employed to make out his returns. On direct examination he testified that he was first employed to make out the returns for 1942, that the first year, 1942, the returns reflected an inventory, that the following years

> " . . . . we reported on the markup. For instance, if he bought, if he sold thirty thousand bags of feed and his margin of profit was thirty-two cents, it was thirty-two cents times thirty thousand bags of feed, ... "

that for 1945 he had 19,200 bags of feed at a profit of 32 cents a bag, that that was the only item he had. He referred to a memorandum, marked for identification as U. S. Exhibit No. 13, and in answer to the question:

> "That a furnished memorandum to you by
>
> Mr. J. L. Holbrook?"

he answered:

> "He furnished the information."

(Tr., pp. 31 and 32). He identified the paper or memorandum as being in his wife's handwriting (Tr., p. 47). He graduated from the University of Georgia (Tr., p. 44) then took a law course at the University of Georgia and was a practicing attorney at the Gainesville, Georgia, bar (Tr., p. 44). On being asked if he remembered the

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extent of the conversation between him and J. L. Holbrook with reference to the tax returns, he testified:

> ". . . . the only thing that I can say that when he came to me the first time, that I am positive that we went into it thoroughly. I wanted to ascertain the manner in which he operated his business, and how he kept his records to see which would be the best approach to file his income tax returns." (Tr., p. 46).

He gave petitioner instructions of what information he had to have to prepare the tax return (Tr., p. 47). Holbrook never at any time suggested in any way or manner that he make a false return or that Holbrook wanted him to get his, Holbrook's, tax as low as he could. He always indicated to Oliver a willingness to furnish any information that Oliver desired or that was necessary to make out a correct return (Tr., p. 47). The Government's Exhibit No. 13 was not in Oliver's handwriting or in Holbrook's, it was in the handwriting of Oliver's wife (Tr., p. 47). She worked in his office (Tr., p. 47) and was not sworn and examined as a witness in this case. He had no personal recollection of the transaction at all, and without the memorandum or notes he wouldn't remember it at all (Tr., p. 49). Petitioner testified that he furnished Oliver with information that he had sold 29,000 and two or three hundred bags of feed and 201,000 baby chicks (Tr., p. 289). Petitioner contends that it thus conclusively appears that Oliver's testimony was altogether insufficient to establish that Government's Exhibit No. 13 contained the only information that petitioner furnished. The Government undertook to show a profit of more than $40,000.00.

The Government was able to trace in sales to:

Wilson & Co.	$285,855.37
M. L. Warren Co.	5,554.32
TOTAL (Tr., p. 117)	$291,490.69

Mr. Oxford (Tr., p. 147) claimed that he found deposited to the account of Stripland & Holbrook checks that he had to assume were from the sale of broilers as follows:

From Piedmont Poultry	$ 1,912.14
From National Poultry Company	2,062.05

Although Mr. Oxford finally stated he didn't know whether the last two checks represented the sale of broilers or not (Tr., p. 173), for the sake of this petition we count them as sales and thus find:

A total sales of	295,383.88

There was a stipulation contained in the record (Tr., p. 69) that petitioner had in court cancelled checks on the Bank of Cumming paid by the Bank of Cumming and charged to the account of Stripland & Holbrook, listed under the heading of:

Checks for feed, purchased by Stripland & Holbrook in the conduct of their business	88,504.50
Checks paid to the Bank of Cumming for drafts drawn on Stripland & Holbrook for feed	39,284.70
Checks for amounts paid to growers for broilers	102,318.33
Another list of checks for feed aggregating	12,612.44
Checks for baby chicks 1945	40,329.31
TOTAL	$283,049.28

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The defendant further offered in evidence (Tr., p. 293 et seq.) cancelled checks:

For Gas and Oil (his Exhibit No. 4)	2,590.31
For repairs on trucks (his Exhibit No. 5)	323.10
The Brock Tire Company	25.45

He further testified (Tr., pp. 296 and 297) that he had cancelled checks for the following:

Insurance premiums on Trucks to Loudermilk Insurance Agency (his Exhibit No. 6)	197.10
State and County Tax	61.25

He testified without any conflict (Tr., p. 293) that he paid out:

For labor	4,282.00

and (Tr., p. 298) that he sustained a loss in the:

Sale of a truck purchased in 1945 and sold when liquidating	224.84
TOTAL EXPENDITURES IN CONNECTION WITH THE BUSINESS	$290,753.33

In addition to the figures just indicated, Mr. Oxford testified: "We have about $9,000.00 more in cancelled checks that the defendant seems unable to produce." (Tr., p. 120). If this $9,000.00 be added to the figure above, it will be seen that it will represent a total expense in the operation of the business of Stripland and Holbrook of $299,753.33

It will thus be seen, giving him the benefit of the doubt of Piedmont Poultry and National Poultry Company, that Mr. Oxford's identification of:

Sales aggregated	295,383.88

If we deduct this amount from:

Actual expense in operating the business	299,753.33

It will be seen that instead of profit, there was:

An actual loss of	4,369.45

If we take:

Mr. Oxford's total deposits	347,067.29

and take from that figure:

The balance of sale of capital assets	2,850.00

We will arrive at the figure testified to by Mr. Oxford (Tr., p. 118):

Of	344,217.29

If we add to the:

Total expenditures of	299,753.33

what Mr. Oxford said (Tr., p. 170) the firm had as:

Bills recivable January 1, 1945	22,717.32

we would have:

A balance of	322,470.65

Mr. Oxford testified (Tr., p. 124) that the firm of Stripland & Holbrook had a:

Balance in the bank January 1, 1945, of	19,653.66

He also testified (Tr., p. 124) that they had a:

Bank balance at the end of 1945 of	17,192.95

If we subtract the last figure from the balance of January 1, 1945:

We have	2,460.71

If we add this figure to:

Total of expense and bills receivable	322,470.65

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we come up with a:

Total of	324,931.36

If we take the last figure ($324,931.36) from the figure testified to by Mr. Oxford (Tr., p. 180) as being:

The net bank deposit	344,217.29

We come up with:

The figure of	19,285.93

When this figure is considered in relation to all the facts and circumstances involved in this case, including the testimony of Mr. Oxford that he could not identify the source from which any of these excess deposits arose (Tr., pp. 163, 164, 165), we submit that a jury was not authorized to infer that this represented profit or taxable income simply because it was deposited in the bank.

JURISDICTION OF FEDERAL COURT

1(g) The jurisdiction in this case arises out of the alleged violation of a Federal statute, Internal Revnue Code § 145(b), 26 USCA. § 145(b).

ARGUMENT

Jurisdiction

1(h) Jurisdiction of this petition is based on 1948 Revised Judicial Code § 1254, Volume 1, page A81, 28 USCA. § 1254, page 42, cited above.

The rule that a certiorari will be granted only under special circumstances in matters of gravity and general importance is fully recognized, but certiorari will be allowed where the importance of the case to avoid any question as to the jurisdiction of the Supreme Court of the writ of error. Montana Mining Co. v. St. Louis Mining

& Milling Co., 204 US 204,, 51 L ed 444; see United States v. The Three Friends, 166 US 1, 41 L ed 897; Emory S. Land, etc., v. R. Stanley Dollar, etc., 330 US 731, 91 L ed 1209.

The Supreme Court will grant certiorari to review a decision involving a Federal question of substance not previously by it determined. Brooklyn Savings Bank v. William J. O'Neil, 324 US 697, 89 L ed 1296; see United States of America v. General Motors Corporation, 323 US 373, 89 L ed 311; Daniel Smith v. United States of America, decided Decmber 6, 1954, 348 US ....., US L ed Volume 99, Advance Sheet No. 3, p. 143.

The Supreme Court may review the decision of a Court of Appeals where it has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, or where a Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, or has decided a Federal question in conflict with applicable decisions of this Court, or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Supreme Court Rules, Rule 19.

Assuming this Court has jurisdiction under the law and facts, the case will be narrowed down to two propositions:

(1) Was the venue properly laid in the Atlanta Division of the trial court over the uncontradicted facts that the business was conducted, the returns prepared and mailed from the Gainesville Division of the Northern District of Georgia?

(2) Was the evidence sufficient to exclude every reasonable doubt of the guilt of petitioner?

The last question is by petitioner "deemed to include

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every subsidiary question fairly comprised therein" as provided in Rule 23(c).

Venue

The questions last stated will be considerd in the order stated.

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed," but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."
>
> **Federal Rules of Criminal Procedure. Rule 18.**

The Constitution of the United States, Article III, Section 2, Paragraph 3, provides:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The provision of Article VI of the Constitution having hereinbefore been quoted will not be repeated.

Was the filing of the return when delivered by mail in the Atlanta Division the offense charged?

Petitioner avers that this exact question has not been determined by the Supreme Court, but it is a matter of such gravity and importance that it should be determined. In Bowles v. United States, 73 F. 2d 772, the point may have been decided, though there is a substantial difference in the facts here involved and the facts involved in that case. This Court denied certiorari in that case in 1935, 294 US 710; 55 S. Ct. 506; 79 L ed 1245. A similar question

was decided in United States v. Newton, D.C.W.D. Va., 68 F. Supp. 952, affirmed Fourth Circuit 162 F. 2d 795, and certiorari denied 1948,333 US 848; 68 S. Ct. 650; 92 L ed 1130. That case was decided by the District Judge December 6, 1946, 68 F. Supp. 952, by the Court of Appeals July 28, 1947, 162 F. 2d 795, and by this Court March 8, 1948, all of which was prior to the enactment of Title 18, "Crimes and Criminal Procedure of the United States Code," on June 25, 1948. Prior to that date there were numerous statutory provisions relating to venue for the trial of various crimes committed against the laws of the United States. By reference to "Crimes and Criminal Procedure of the United States Code," enacted June 25, 1948, § 3232, 18 USCA. 3232, will be found a reference back to Rule 18, and many other statutory provisions relating to venue significantly are left out of that Code.

The exact point here involved has not been decided by the Supreme Court since the fourth great landmark in the history of Federal criminal legislation was adopted.

We think this Court has decided a case involving the principle here contended for, though not the exact point. In United States v. Johnson, 53 F. Supp. 596, the question involved was use of mails to send a set of dentures from Illinois to Delaware, and the trial court, January 26, 1944, held that the crime was completed when the denture was deposited in the mails in Illinois and that the court in Delaware where it was sent had no jurisdiction. On appeal by the United States in United States of America v. Margaret M. Johnson, 323 US 273, 89 L ed 236, this Court affirmed the judgment of the trial judge. From that decision we quote:

> "Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the framers worte into the Constitution that 'the trial of all crimes . . . shall be held in the State where the said crimes shall have been committed . . . . ' As though to underscore the importance of this safeguard, it was re-

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inforced by the provision of the Bill of Rights requiring a trial by an impartial jury of the State and district where the crime shall have been committed."

By Rule 18, "Federal Rules of Criminal Procedure," not only did this Court in formulating the rule and Congress in adopting it recognize the importance of the Constitutional provision, but an additional provision that the trial should occur not only in the State and district where the crime was committed, but significantly added "but if the district consists of two or more divisions, the trial shall be had in a division in which the offense was committed." Certainly there is no provision contained in "Federal Rues of Criminal Procedure" or the Internal Revnue Code providing that venue of the crime charged should be where the return was filed, and the language with which Rule 18 begins is here significant, "Except as otherwise permitted by statute or by these rules, ... " If Congress had intended to make the filing the crime, it certainly could have found more appropriate language. Since the effective date of that rule, the Government has instituted a prosecution based upon the same statute in a District Court of the United States for the Southern District of New York where the return was mailed to the Collector of Internal Revenue at Albany, New York, in another district, and the trial judge held:

> "Venue of prosecution for wilfully attempting to defeat and evade income tax due to the United States by wilfully preparing and causing to be prepared and mailed a false and fraudulent income tax return was properly laid in district in which such return was prepared and mailed though it was filed with the Collector of Internal Revenue in another district."

United States v. Albanese, et al., 117 F. Supp. 736.

That decision is exactly contrary to the holding of the Court

decision is exactly contrary to the holding of the Court of Appeals in this case. We are not advised of what has happened to the case, though it was decided January 14, 1954. The reasoning of that case, as well as reasoning by this Court in Spies v. United States, 317 US 495, at page 499; 63 S. Ct. 364, 368; 87 L ed 418, seems applicable here. We submit the Albanese case is sound.

If Congress had undertaken to make the filing of a false return the crime, it could have used language so indicating. If the rule announced in the Albanese case is sound, the decision complained of here is unsound.

Can the Government in one State or even in one case have the privilege of selecting its forum to try a case by contending that the filing of the return constitutes a substantial part of the intention to defraud and fix venue at the place of filing, but that the making of a false return and having it prepared in another district might also fix the venue there and it can decide between the two. We submit this a matter of gravity and importance, and the circumstances require an authoritative ruling from this, the highest Court in our Nation. See United States of America v. Johnson, 323 US 273, cited above.

Was The Evidence Sufficient

Having pointed out the weakness of the testimony of tax attorney Oliver that the memorandum from which he claimed to have made the return was in the handwriting of his wife, who was not called as a witness; that independently of that memorandum he wouldn't remember the facts sworn to at all (Tr., p. 48), the attention of the Court is invited to the fact that Mr. Oxford testified that Oliver was a reputable attorney (Tr., pp. 210, 211), that from an accountant's standpoint none of the returns made by Oliver were correct, that for a business of the kind in question the regulations required the return to set out the gross amount of purchases of goods bought, the gross amount of sales made, and then account for the inventory

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at the beginning and end of the year, and there was not a single one of these returns that is made out on that kind of a basis from beginning to end and from the very first all the way through (Tr., p. 211). Take these facts in the light of the testimony of both Mr. Oxford and Mr. Trotter that these people were not engaged in any other business except the feed and poultry business and so far as they were able to find they were receiving no money from any other source other than that business (Mr. Oxford, Tr., p. 210; Mr. Trotter, Tr., pp. 226, 227). The gross sales, when compared to the gross expenses for which cancelled checks were in Court, as hereinbefore demonstrated, showed no profit, that the excess in the bank over the gross sales could not have come from a taxable income is almost demonstrated. The evidence is entirely circumstantial, and construing the Government's evidence in the most favorable light, we find Mr. Oxford testifying (Tr., p. 170) that on January 1, 1945, the partnership had bills receivable of $22,717.32, and he testified (Tr., p. 168) that he got the inventories from the returns. He testified (Tr., pp. 210, 211) that none of the returns from beginning to end had an inventory. He testified (Tr., pp. 107, 118, 140) that he used the bank account because the books were inadequate. Therefore, the effort to convict is nothing more nor less than a net worth method under Internal Revenue Code § 41, 26 USCA. § 41, and the assets at the beginning of the year 1945 were insufficiently fixed and were so indefinite that it fails to come up to the rule announced by this Court in Daniel Smith v. United States, 348 ....., 99 L ed 143 (11), thus placing the decision complained of contrary to a decision of this Court. Likewise it is contrary to a decision of another Court of Appeals from the Seventh Circuit in United States v. Fenwick, 177 F. 2d 488, on the proposition that it failed to definitely establish the basic net worth of petitioner at the beginning of 1945 (see Headnotes 6 and 7 United States v. Fenwick cited above) and on the further proposition that the Government had the burden of proving by evidence "that excludes all possible available sources of taxable income from which increased net worth

and the excess expenditures could have been derived" (see Headnote 4).

The venue was improperly laid. The evidence is wholly insufficient to show that the excess of deposits over expenses constituted profits for the year 1945. It was insufficient to exclude every reasonable hypothesis except that the income was profit. It was insufficient to show beyond a reasonable doubt a specific intent to defraud the Government. The Government had the burden of proof that the tax return was made "with intent to evade a tax believed to be owing and mere negligence, whether slight or great, is not the equivalent of such intent." Mitchell v. Commissioner of Internal Revenue, 118 F. 2d 308. The tax attorney testified that petitioner asked what information he would need to make the tax return, that petitioner always indicated a willingness to furnish any information that the tax attorney desired which was necssary to make out a correct return (Tr., pp. 46, 47), that petitioner never suggested or indicated the slightest disposition to evade his tax (Tr., p. 49). Petitioner willingly turned over his records to the investigating agents. There was no scintilla of evidence of wilfulness in hiding or concealing records. The money was openly deposited in a bank. The bills were paid with checks. The bank statements showed fully all deposits and all checks. Besides, petitioner was shown to be a man of good character by the highest evidence: Paul Worley, a bank cashier, with many years acquaintance (Tr., pp. 71, 72); J. V. Merritt, the Clerk of the Superior Court of Forsyth County for twenty-one years, with long acquaintance (Tr., pp. 200, 201); James A. Otwell, a Representative in the General Assmbly of Georgia (Tr., p. 201); W. E. Purcell, a Minister of the Gospel (Tr., pp. 204, 205); Early Buice, a business man (Tr., p. 206); and Grady Vandiviere, Solicitor General or Prosecuting Attorney for the Blue Ridge Circuit, including Forsyth County, for seventeen years (Tr., pp. 220, 221). The record contains no evidence of previous law violation. Petitioner had a right to rely upon the advice of the tax attorney employed by him, whose char-

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acter was vouched for by Mr. Oxford, Government witness (Tr., p. 211). The Government failed to carry the burden placed upon it by law:

(1) That the excess of bank deposits over checks given as an expense incurred in the business was profit earned in the year 1945.

(2) That petitioner knowingly and wilfully attempted to evade a tax believed by him to be due.

A certified copy of the opinion and judgment of the Court of Appeals is attached to the Transcript of Record certified here and nine additional copies are filed simultaneously herewith, and the Court may find the opinion of the Court of Appeals Tr., p. 358. For this reason, it is not attached hereto.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings, including Exhibits, in the case numbered 15,061, J. L. Holbrook, Appellant, v. United States of America, Appellee, and that the judgment of the Court of Appeals, Fifth Circuit, may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem mete and just, and your petitioner will ever pray.

J. L. HOLBROOK

By:.....

A. C. Wheeler
Counsel for Petitioner

Address:
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Gainesville, Georgia

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15061

J. L. HOLBROOK,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(October 29, 1954.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

HUTCHESON, Chief Judge: Charged in a one count indictment with knowingly and wilfully attempting to defeat and evade income taxes due and owing by him "by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Georgia at Atlanta, Georgia, a false and fraudu-

lent income tax return" for the calendar year 1945, and found guilty, defendant was sentenced to pay a fine of $1500 and to imprisonment for a year and a day.

Appealing from the judgment and sentence, defendant is here pressing upon us two claims of error.

The first attacks the prosecution in the Atlanta instead of the Gainesville division of the district on two grounds: (a) that the Atlanta division of the court was without jurisdiction to proceed in this cause because the offense, if any, was committed in the Gainesville division; and (b) that the court erred in denying defendant's motion, under Rule 21(b) Federal Rules of Criminal Procedure, to transfer the case to that division.

Conceding that **Bowles v. United States**, 73 F(2) 772 holds directly contrary to ground (a), that the court was without jurisdiction to try this cause in the Atlanta division, appellant insists that Rule 18, Federal Rules of Criminal Procedure[1] is inconsistent therewith and now governs.

Without pointing to any case dealing directly with the question he presents, he urges that the established general principle, that the trial of crimes shall be held in the state and district where they have been committed, requires the ruling here that, since everything that was done by the defendant in this case occured in the Gainesville division, he should have been prosecuted there.

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1 "Except as otherwise permitted by statute or by these rules, prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed". Rule 18, Fed. Rules of Criminal Procedure.

Invoking the statutory provision, 18 U.S.C.A., Sec. 3237, providing that "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed", appellant insists that when the defendant "procured Oliver to make his tax return, signed it and mailed it at Cumming, if he was guilty of a crime it was then complete, even had it never been received by the Internal Revenue Collector."

While we find ourselves in general agreement with this view,[2] we are also in no doubt that since the return was filed in Atlanta and the indictment charged the filing there of false retunrs, the crime committed in so doing was properly, indeed should have been, prosecuted in the Atlanta division.

For the same reason, the indictment having been drawn so as to charge, as the offense, the filing of a false and fradulent return with the clerk at Atlanta, the second ground of this claim of error, that the prosecution should have been transferred to the Gainesville Division, is without any sound basis.

Passing to the second claim of error, the one most argued by appellant and the one on which he mainly relies, that the evidence did not make out a case for a jury verdict, we find it no better taken. Urging upon us that the evidence failed in both of the respects essential to a conviction, (1) that the defendant failed to report all of

2 Cf. Beaty v. United States, 213 F(2) 712 and authorities cited.

his income, and (2) that such failure if any was wilfully evasive, appellant relies upon the claim: that the record compels the view that he employed one Oliver, an attorney at law expert in such matters, to prepare his income tax returns; that he gave him every assistance possible in preparing the returns; that the evidence of the United States in rebuttal of the information furnished Oliver and the returns made out by him was inaccurate and faulty; and that in pursuing the method employed, the witness for the govenment has failed to properly credit defendant with sums on hand and has made inaccurate and incorrect charges to income.

We cannot agree with these views. We think the most that can be said of appellant's contentions with respect to these matters is that his proof did make out a jury issue on which the jury might well have found for him. The defendant did not have a bookkeeper to keep, and did not himself keep, a complete set of books from which his income could be adequately determined and in order to find out what was actually paid out for merchandise or for ordinary expenses, it was necessary to resort to other sources. His records being in this condition, resort was properly had to bank statements and cancelled checks, and the uncontradicted testimony establishing that all the recipts of the partnership of Stripland and Holbrook were deposited in the bank account, it was entirely proper to have transcripts of them made, and the jury could have found, and did find, that the testimony of the government as to receipts, expenses and income was given with complete fidelity to these sources. Thus, when all is said and done, the absence of complete and adequate records, the discrepancies between the amount of income

testified to by the government agent and that returned, the testmony of Oliver as to the disclosures made to, and information given him by the defendant all combined to make fact issues for the jury.

Replying to appellant's complaint that this is a circumstantial evidence case and the circumstances are not sufficiently cogent to take the case to the jury, the United States citing **Gleckman v. U.S.**, 80 F(2) 394, **Sasser v. U.S.**, 208 F(2) 535, **Pollock v. U.S.**, 202 F(2) 281, and **U.S. v. Johnson**, 319 U.S. 503, insists that the method employed in making out a case was entirely appropriate and especially safeguarded against abuse. Pointing to the undisputed evidence that all the business receipts went into the bank account and all expenses and disbursements were paid from that account except certain cash payments for labor, for which full credit was given, and to the fact that the computation was made on a cash basis wholly consistent with the method of reporting used by the partnership for prior years, it insists that every known factor was given its proper effect in the computation.

While it is true that the defendant did employ a tax atorney to make his returns and did furnish him information, the evidence discloses that the tax attorney who made the return never inspected or audited the appellant's books, that he had no first hand method or way of knowing the sources of income in the partnership business, and that he accepted appellant's statement of the margin of profit on the sale of feed and the number of bags of feed sold. The evidence discloses, too, that defendant furnished no figures reporting the profit on baby chicks or on the sale of broilers, and it further discloses that the number of bags of feed on which profit was

figured was not correctly given.

While this court is fully aware of, and has in numerous cases pointed out the dangers inherent in the gross receipts and expenditures method and other kindred methods of making out a case of income tax evasion by the use of circumstantial evidence unless care is taken to guard against their misuse,[3] the evidence in this case is notably free from any suggestion of such abuse. Based as it was upon bank statements and entirely free from the sources of error which normally attend the circumstantial evidence approach, this case can almost be said to be in a class by itself.

We find no error. The judgment is AFFIRMED.

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3 Bryan v. U.S., 185 F(2) 223; Demetree v. U.S., 207 F(2) 892.

A True copy:

Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.